there in question was a contempt and the printers concerned were committed. (I mention this because it appears to be suggested in *Dunn v. Bevan*[6] that this was a case in which the proceedings for contempt failed).

Clearly not every libel against a prosecuting officer in a criminal case is a contempt of Court, but the remarks in the letter here complained of seem to me not only to be an attack upon the prosecution but also to carry the necessary implication that the trial Court permitted the Deputy Public Prosecutor before it to adopt a course in respect of the accused which was unfair and resulted in a miscarriage of justice.

It seems to me therefore that the letter complained of constituted a contempt of Court in two ways — as tending to prejudice the fair disposal of the appeal and of any subsequent proceedings which might be ordered; and also as reflecting upon the administration of justice by the Court. I hold, therefore, that this letter constituted such a contempt of Court as justifies this Court in interfering in these proceedings.

In deciding what order should be made I would consider the fact that the whole trouble originated with the Respondents' own publication of an inaccurate report of the trial. Unfortunately, reports of proceedings in this country are only too often inaccurate, though I lay no blame upon anyone for this because the facilities for accurate reporting are incomparably less adequate here than they are in England. But the Respondents should have been on their guard against this possibility — indeed the fact deposed to in his affidavit that the Editor instructed the Respondents' representative in Kuala Lumpur to make further enquiries about the case suggests to me that he suspected the accuracy of the report. Yet the letter complained of was published without awaiting the results of that enquiry, and with the knowledge that an appeal was pending.

These circumstances might have inclined me to impose a substantial punishment in this case but I also bear in mind that the Respondents took the very proper course of tendering an immediate and ample apology and that their affidavit give a very frank and full explanation of how the letter in question came to be published. I do not think, in the circumstances, that this is a case in which any penalty should be imposed. I therefore confine myself to ruling, having regard to the possibility of future cases, that the letter here in question constituted a punishable contempt of this Court.

In view of an intimation by counsel that certain submissions might be made upon the question of costs, I reserve this question for further argument.

Ruled that the letter constituted a punishable contempt.

MAN LEE LOONG KONGSI v. KWONG LOONG MINING KONGSI AND ANOTHER.

[App. Civil Juris. (Jobling, J., Callow, J. and Russell, J.) July 24, 1948]

[Perak — Civil Appeal No. 4 of 1948]

Civil Procedure Code S. 497 — Order to enter upon and prospect land to secure evidence for assessment of damages.

In 1937 the Appellants obtained judgment for damages for breach of contract against the defendants and an enquiry was ordered by the Registrar as to the amount of damages suffered. In 1940 the appellants obtained an order to enter upon prospect and prove the mining land in respect of which the damage had been suffered. The appellants also obtained a conditional attachment of the land. Inspection was made by a firm of mining engineers on behalf of the appellants and a report filed. Subsequently the respondents filed a reply and a report of other mining engineers engaged on their behalf traversing the report of the appellants' experts. In February 1948 the appellants again applied for an order to enter upon prospect and prove the land for the purpose of obtaining further evidence to support their claim for damages and to rebut the allegations of the respondents. The application was objected to by the respondents on the ground (1) that the Court had no power to make the order as the respondents were no longer in possession of the land, (2) that even if the Court has power the Appellants had already obtained one order and was not entitled to repeated orders, and (3) there had been unreasonable delay in the application for a further order.

Held, (1) that as there was an order of Court attaching the property and restraining the respondents from dealing with it the respondents could not be heard to say that they have transferred it and in any case there was no evidence to show that the property was not in the possession of the respondent; (2) that there could be no objection to repeated orders if justice demanded them and the matter was one within the discretion of the Court; (3) that there was in fact no unreasonable delay in the making of the application.

Case referred to:—

(1) *Garrard v. Edge* 37 W.R. 501.

CIVIL APPEAL.

J. L. Woods for the Appellants.

R. D. Hume and J. L Lewis for the 1st Respondents.

Jobling, J.: — The history of the appeal is as follows. The Plaintiffs/Appellants obtained judgment against the Defendants/Respondents in 1937 for damages in respect of breach of contract and an enquiry by the Registrar as to the amount of damages suffered was ordered.

The Appellants then sought an order in the same terms as the order the subject of these proceedings i.e. to enter upon prospect and prove the mining land in respect of which the damage had been suffered. This application was refused by the Supreme Court Ipoh but subsequently granted by the Court of Appeal in March 1940. Inspection was made by a firm of Mining Engineers on behalf of Plaintiffs and a report filed together with particulars of damages based on it. Appellants also applied for and obtained a conditional attachment of the land in question and an order restraining the Respondents from transferring, leasing or charging it.

The Respondents filed a reply and a report of other mining engineers engaged on their behalf traversing the report of the Appellants' experts. This was in November 1940 and no further legal proceedings were taken until February 1948 when Appellants again applied to the Supreme Court for an order to enter upon prospect and prove the same land for the purpose of obtaining further evidence to support their claim for damages and to rebut the allegations of the Respondents.

The application was refused and the Appellants have appealed to this Court.

The Respondents objected to the making of the order on the ground first that the Court had no power to make the order and then alternatively that (a) even if the Court has power the Plaintiff has already obtained one order and is not entitled to repeated orders and (b) there has been unreasonable delay in application for a further order.

In support of the alternative grounds (a) and (b) it is urged that if applicants are held entitled to repeated orders of this kind there will be no finality to the proceedings and that the fact that the Appellants took no action between November 1940 and February 1948 constitutes unreasonable delay.

I am unable to see the force of either of these contentions. There can be no objection to repeated orders if justice demands them. The matter is one within the discretion of the Court and that discretion will be exercised to ensure finality when necessary. Also I think there can be no unreasonable delay in seeking to obtain evidence where the Court's powers are invoked at any time before the evidence is required by the Court. If the Respondents considered that there was unreasonable delay in holding the inquiry before the Registrar they could have taken steps to have it held within a reasonable time. In my view these two contentions have no substance and must fail.

The Respondents' main contention however is that the Court has no power. They state that the Defendants to the suit are not now in possession of the land and therefore on the authority of the decision in *Garrard v. Edge*[1] (referred to at page 918 of the Annual Practice 1946-7) no order to inspect the land can be made on the present application.

In support of this Counsel drew attention to the averment in the Affidavit of Hon Boon Poh dated 30th September 1940 that the 1st Respondents have been incorporated as a private Company under the Companies Ordinance and that the Company had acquired the business of the 1st Respondents as a going concern.

This affidavit was filed after the attachment order of 23rd September 1940 restraining the transfer, leasing or charging of Respondents' property and was apparently made for the purpose of an application to raise the attachment. Whatever application was intended does not appear to have been proceeded with. In any case it is not conclusive evidence that the property has been transferred and in the face of the order of the Court attaching the property and restraining Respondents dealing with it the Respondents cannot be heard to say that they have transferred it.

It is not in evidence but was admitted by Counsel that the sub-lease of mining land which forms the property in question still stands registered in the name of the 1st Respondents in the Register of Mines.

There is therefore no evidence that the property is not still in the possession of the 1st Respondents and the contention that the Court has no power to make the order on this ground therefore also fails.

The Appellants have applied for the order to inspect so that they may obtain evidence in a matter under judicial inquiry and the Court having power to make the order, I see no grounds on which it can be refused. It is only a question of terms. The Respondents ask that the terms shall be that the costs of inspection be borne in the first instance by themselves, and that Respondents shall be at liberty at their own expense to supervise the inspection.

I think these terms are equitable and if the inspection is proved to be unnecessary the Respondents will have a good claim for any costs of its supervision.

I would therefore allow the appeal with costs here and in the Court below and grant an order in terms of the Appellants' Summons of 5th March 1948. As the second defendant is reported dead the costs should be paid by the first Defendant/Respondent.

Callow, J. : — I have had the advantage of reading the judgment of the learned President and my Brother Member of the Court and I agree that this appeal should be allowed.

In the face of the restraint order of the 23rd of September, 1940, the defendants-respondents cannot plead non-possession, and although the delays have been long and unforunate, I do not find them unreasonable.

The principal submission by the respondents is that this Court lacks the necessary power to grant the order sought, for a similar one had been obtained previously and satisfied.

I think the test is whether it is in the interest of justice to grant this further order. In my view it is entirely discretionary. The appellants satisfied me that a further inspection might provide additional evidence to present to the Registrar when the inquiry is held, and if it transpires ultimately that this second inspection, the costs of which are to be borne in the first place by the appellants, suffices no useful purpose, then it becomes a matter for argument on costs. It is a risk volunteered by the appellants with full cognisance of the expense which may be incurred.

I would allow this appeal and grant the order sought in the summons of the 5th of March, 1948. As regards costs, the second defendant-respondent being reported dead, the first defendants-respondents should pay the costs of this appeal and of the application in the Court below.

Russell, J. : — This an appeal from the refusal of a Judge in Chambers to make an order under section 497 of the Civil Procedure Code under which the plaintiffs-appellants sought to enter upon certain land in the possession of the defendants-respondents and inspect the property, the subject matter of a suit between them.

This suit was commenced in 1937 by the plaintiffs-appellants who are a mining partnership. The first defendants-respondents are also a mining partnership and the second defendant-respondent was the receiver and manager of the first defendants-respondents.

The first defendants-respondents were in occupation of certain mining land under a sub-lease and they orally granted to the plaintiffs-appellants the right to work a certain portion of the said land. The learned Judge who tried this case found that the first and second defendants-respondents had wrongfully terminated their agreement with the plaintiffs-appellants and that the latter had suffered damage. He thereupon ordered an enquiry before the Registrar as to the amount.

On the 5th of March, 1940, the plaintiffs-appellants obtained an order under section 497 of the Civil Procedure Code similar to the order for which they are now asking, and in the report of their experts who carried out a number of boring operations on the land filed their particulars of damage on the 9th day of October, 1940. The reply to the particulars was dated 5th of November, 1940.

The purpose of the inspection was to enable the the plaintiffs-appellants to ascertain the tin ore content of the land so that the amount of damages to be paid by the defendants-respondents could be ascertained. No enquiry as to damages has yet been held by the Registrar.

The learned Judge in dismissing the application for a further order was of the opinion that the plaintiffs-appellants having obtained one order to assist them had neglected to pursue the matter further and that a further order could serve no useful purpose as evidence of the state of the land had been obtained nearer the material time and that it was for the Registrar to accept one version or the other.

There was an enormous discrepancy between the estimates put forward by the experts for the plaintiffs-appellants and the experts for the defendants-respondents, the latter suggesting that this could be explained by assuming that two of the bore holes sunk by the former experts had been "salted."

The plaintiffs-appellants in support of their appeal now argue that there was abundant evidence from the Court file that subsequent to the first order they had actually pursued the matter up to the month of January, 1941 and that subsequently their legal advisers were hampered by the calling up for military service of certain of their legal personnel and by the course of the war. It was admitted mining took place on the area of the land covered by the sub-lease during 1940, 1941 and again in 1946, but no mining took place on the area during the years of the Japanese occupation. There was attached to the affidavit of the managing partner of the plaintiffs-appellants a record obtained from the Inspector of Mineral Ores, Perak, a statement which shows that during the period September 1940 to January 1947 some 9,000 piculs of tin ore had been recovered from the area covered by the sub-lease but not necessarily from that portion of the land worked by the plaintiffs-appellants.

The plaintiffs-appellants further argue that as the damages depend upon the tin ore content and as the estimates of the experts were previously made upon boring only, better evidence is now available as tin ore has been removed and a certain area of the ground treated during such removal.

Mr. Hume who appeared with Mr. Lewis for the first defendants-respondents supported the refusal of the learned Judge to grant the order on three grounds. Firstly, that the Court has now no power to grant an order under section 497 of the Civil procedure Code as the land is no longer in the possession of the first defendants-respondents. If this were so, it would be a valid objection to the granting of an order, but on the 23rd of September, 1940, the plaintiffs-appellants obtained a conditional attachment of the sub-lease restraining the first defendants-respondents from transferring, leasing or charging the land. This order has never been cancelled nor was any certified copy of the title produced showing that the first defendants-respondents had in fact parted with possession. In the absence of any further evidence there is a presumption that the defendants-respondents are still in possession and whilst the order of 23rd September, 1940 remains in force they cannot be heard to say that they have parted with possession.

The other grounds put forward by the defendants-respondents in support of the refusal were that the plaintiffs-appellants had been guilty of unreasonable delay, that having had one order there must be some finality to the matter and further inspections by the plaintiffs-appellants would be very expensive and a waste of money.

It was not suggested that there has been any unreasonable delay since the re-occupation by the British forces, and in view of the conditions prevailing in Malaya from 1941 until the re-occupation I am not prepared to say that there has been unreasonable delay. It was also open to the defendants-respondents to expedite the hearing before the Registrar if they had so wished.

I am of the opinion that in view of the fact that more reliable evidence than the previous estimates which were based on boring only is available it is right in the interests of justice to allow such evidence to be produced to assist the Registrar in his task of deciding the amount of damages to be paid. It is to be noted also that the defendants-respondents will be able to produce their figures as to the actual amount of tin ore which has been extracted since the previous inspections by the experts. I would allow this appeal and grant the order asked for by the plaintiffs-appellants in the terms of their summons dated the 5th of March, 1948.

The second defendant-respondent did not appear on this appeal, he was stated to be dead. I think, therefore, that the first defendants-respondents should pay the costs of this appeal and of the application before the learned Judge in Chambers.

Appeal Allowed.

TAN SENG ANN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Callow, J. and Russell, J.) August 5, 1948]

[Kuala Lumpur — Criminal Appeal No. 68 of 1948]

Emergency Regulations, 1948 Section 4 S. (1)(a) — Possession of firearm — Defence of duress — Penal Code S. 94.

In this case the appellant was convicted under Regulation 4 (1) (a) of Emergency Regulations 1948 for being in possession of a firearm, to wit, a revolver. In giving their opinions, the assessors added a rider that the appellant had acted under duress. The learned trial Judge subsequently directed the assessors on the law relating to duress. On appeal, it was contended that the learned trial Judge had erred in directing the assessors that only fear of immediate death would be a sufficient excuse.

Held, that the learned trial Judge was correct in his direction as duress to be pleaded successfully must be imminent, extreme and persistent.

Cases referred to :—

(1) *M'Growther's Case* 168 E.R. 8.

(2) *R. v. Stratton* 99 E.R. 156.

CRIMINAL APPEAL.

H. Y. Teh for the Appellant.

E. N. Griffith-Jones (Crown Counsel) for the Respondent.

The Judgment of the Court of Appeal was given by :—

Willan, C. J. : — In this case the appellant was convicted under Regulation 4(1) (a) of Emergency Regulations, 1948, for being in possession of a fire-arm, to wit a revolver, on the 18th July, 1948. Since the only punishment prescribed for such an offence is death, the appellant was sentenced to death.

The prosecution proved that the appellant and 4 other Chinese were stopped by the police on the night of 18th July, 1948, whilst travelling in a motor car. They were detained and searched. On the person of